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Nos. 96-954 and 96-1230

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

PUBLIC SERVICE COMPANY OF COLORADO, ET AL.

WILLIAMS NATURAL GAS COMPANY, CROSS-PETITIONER

v.

AMOCO PRODUCTION COMPANY, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether gas producers who charged prices in excess of the maximum lawful wholesale rate formerly in effect for natural gas under the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, must make refunds that are retroactive either to 1983 or to 1978, the effective date of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 91 F. 3d 1478. The initial opinion of the Federal Energy Regulatory Commission (Pet. App. 35a-59a) is reported at 65 F.E.R.C. (CCH)

[1] References to "Pet. App." are to the appendix to the petition in No. 96-954.

¶ 61,292, and its opinion on rehearing (Pet. App. 60a-83a) is reported at 67 F.E.R.C. (CCH) ¶ 61,209.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. Petitions for rehearing were denied on November 6, 1996. Pet. App. 31a-34a. The petition for a writ of certiorari in No. 96-954 was filed on December 13, 1996. The cross-petition for a writ of certiorari in No. 96-1230 was filed on January 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns orders of the Federal Energy Regulatory Commission (Commission or FERC) requiring partial refunds of a Kansas *ad valorem* tax that natural gas producers had collected for more than a decade under an interpretation by FERC of Section 110 of the Natural Gas Policy Act of 1978, 15 U.S.C. 3320 (1988) (repealed), that was later reversed.

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, authorized the Commission to establish "just and reasonable" rates for sales by the producers of natural gas. 15 U.S.C. 717d(a). In 1974, pursuant to that authority, FERC's predecessor, the Federal Power Commission (FPC), allowed producers to increase the otherwise applicable just and reasonable rate in order to recover "production, severance, or similar taxes."[2] Kansas imposed an *ad valorem* tax

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[2] Opinion No. 699, *Just and Reasonable National Rates for Sales of Natural Gas*, 51 F.P.C. 2212, 2301-2302, reh'g denied in relevant part, 52 F.P.C. 1604 (1974), aff'd *sub nom. Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976).

on producers that the FPC held qualified as a recoverable production tax.[3]

In 1978, Congress enacted the Natural Gas Policy Act (NGPA), 15 U.S.C. 3301 *et seq.*, which imposed certain statutory ceilings on natural gas rates. Section 110 of the NGPA allowed producers to recover charges in excess of the applicable statutory ceilings "to the extent necessary to recover * * * State severance taxes attributable to the production of" natural gas. 15 U.S.C. 3320(a)(1) (1988) (repealed) (Pet. App. 103a). Section 110 defined a severance tax for those purposes as "any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas." 15 U.S.C. 3320(c) (1988) (repealed) (Pet. App. 104a); see *id.* at 10a.

In 1983, after passage of the NGPA, several parties filed petitions with the Commission taking the position that the FPC's 1974 order should be abandoned and that recovery of the Kansas *ad valorem* tax should be disallowed under Section 110 of the NGPA. The Commission denied those petitions in *Sun Exploration & Production Co.*, 36 F.E.R.C. (CCH) ¶ 61,093 (Sept. 23, 1986), reh'g denied *sub nom. Northern Natural Gas Co.*, 38 F.E.R.C. (CCH) ¶ 61,062 (Jan. 28, 1987) (*Sun Exploration*), and authorized producers to charge prices in excess of the statutory price ceilings in order to recover the costs of the Kansas *ad valorem* tax.

2. The court of appeals granted a petition for review and remanded, concluding that the Commission had not explained its decision "by reference to any cogent theory of what makes a tax 'similar' to a

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[3] Opinion No. 699-D, *Just and Reasonable National Rates for Sales of Natural Gas*, 52 F.P.C. 915 (1974).

production or severance tax under § 110." *Colorado Interstate Gas Co.* v. *FERC*, 850 F.2d 769, 773 (D.C. Cir. 1988) (*Colorado Interstate*). Although the court acknowledged that the Kansas tax relates to production, in that "past production is used to estimate the net present value of future production from a gas-producing property, and thus the property's taxable value," the court held that the Commission "failed to offer any principle for determining what relation to production is enough for a tax to qualify under § 110." *Id.* at 770.

3. FERC concluded on remand that the Kansas tax should be viewed as a property tax and not a severance tax eligible for recovery under Section 110. Pet. App. 43a-49a. As a remedy, FERC ordered refunds of only those taxes that had been included in the rates charged after June 28, 1988—the date of the court of appeals' decision in *Colorado Interstate*. In FERC's view, before that decision, producers reasonably relied on Commission orders holding that the Kansas tax could lawfully be recovered. After *Colorado Interstate*, however, producers were on notice that the Kansas tax might no longer be recoverable under Section 110. *Id.* at 51a-53a.

Several parties petitioned FERC for rehearing, arguing for either non-retroactive or more fully retroactive refunds. Cross-petitioner Williams Natural Gas Company (Williams) (No. 96-1230) did not, however, seek rehearing. No party ever requested that FERC order refunds dating from 1978. The only party that even adverted to the possibility of refunds dating from 1978 was respondent Public Service Company of Colorado (PSCC). PSCC observed that "it could well be argued that the date of retroactivity should be established as far back as December 1, 1978,

the date on which the NGPA became effective," but conceded that "fundamental fairness . . . [dictates] that the date on which interested parties were put on notice of the dispute should control the date of retroactivity." Request for Rehearing, *Colorado Interstate Gas Co.*, FERC Dkt. Nos. GP83-11-003 and RI83-9-004 (Jan. 3, 1994) (PSCC Rehearing Request) at 6; see Pet. App. 19a. PSCC thus argued that FERC "should have selected August 22, 1983" (the date of the petitions urging the Commission to reverse its policy in view of enactment of the NGPA), "or in the alternative October 4, 1983" (the date when notice of those petitions appeared in the Federal Register), as the "operative date" for refunds. PSCC Rehearing Request at 6. FERC denied rehearing. Pet. App. 60a-83a.

4. The court of appeals granted a petition for review by utilities and state public service commissions affected by the scope of the remedial order,[4] and held the producers liable to refund all of the Kansas taxes collected for the period since October 1983. Pet. App. 18a-24a. The court relied on the same legal test as had FERC (see *id.* at 50a-51a), invoking "[t]he governing principle" that "when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule,'" *id.* at 18a (quoting *Williams Natural Gas Co.* v. *FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

The court, however, rejected FERC's selection of the date from which refunds should run under that

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[4] Cross-petitioner Williams participated in the appeal as an intervenor, pursuing only an issue not relevant here.

test, reasoning that "enactment of a substantially new regulatory regime [upon passage of the NGPA] in 1978 undermined any assurance that the FPC's treatment of the Kansas tax under the NGA would withstand scrutiny under the NGPA." Pet. App. 24a. The court emphasized that "[h]ere the agency did not change the law—rather, the Congress did when it enacted the NGPA in 1978." *Id.* at 28a. In the court's view, "the status of the Kansas tax was expressly drawn into question in 1983" when parties first petitioned FERC for a ruling that producers could not lawfully recover the tax under the NGPA. *Id.* at 24a. "Because no seller of natural gas could justifiably be confident that it was entitled to recover the tax until the legal question was settled anew under the new statute," the court held, "the producers' liability for refunds extends back to October 1983, the date when all interested parties were given notice in the Federal Register that the recoverability of the Kansas tax under § 110 of the NGPA was at issue." *Ibid.*

The court did not require refunds for taxes collected from 1978 to 1983 because, it observed, "there is before us no controversy over those monies." Pet. App. 24a. Two litigants before the court of appeals, PSCC and the Missouri Public Service Commission (MPSC), raised the issue there for the first time, but the court rejected their claims. The court noted that PSCC had sought refunds only from 1983 before the Commission, that MPSC had not sought refunds and, in any event, as an intervenor on appeal, MPSC could "join issue only on a matter that has been brought before the court by another party." *Id.* at 20a n.* (quoting *Illinois Bell Tel. Co.* v. *FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)). Accordingly, the court con-

cluded, PSCC and MPSC were "precluded from raising that argument" before the court. Pet. App. 20a n.*.

ARGUMENT

We agree with petitioners Amoco Production Company, et al. (Amoco) (96-954 Pet. 8-14) that the remedial judgments of administrative agencies, including FERC, must ordinarily be accorded great deference, and may be set aside only for abuse of discretion or lack of substantial basis. We do not, however, view the court of appeals' decision as generally derogating from that established principle. The remedial question in this case arose in the specific context of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, which set statutory ceiling prices for natural gas, rather than affording FERC the discretion to do so, as under the NGA. Moreover, the operable provisions of the NGPA have since been repealed. Accordingly, review by his Court is not warranted.

1. Amoco contends (96-954 Pet. 9-11) that the decision of the court of appeals conflicts with cases recognizing the broad remedial discretion of administrative agencies, and affording deference to exercises of that discretion. The court below did not, however, purport to depart from those principles, or to call into question the District of Columbia Circuit's own decisions applying them. See, *e.g.*, *Exxel/Atmos, Inc.* v. *NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994) ("[W]e owe particular deference to the [agency's] choice of remedy."); *Laclede Gas Co.* v. *FERC*, 997 F.2d 936, 944 (D.C. Cir. 1993) ("FERC enjoys a great deal of flexibility in the remedy phase of an enforcement proceeding."); *Public Utils.*

Comm'n v. *FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993) (citations omitted) ("[A]gency discretion is often at its zenith when the challenged action relates to the fashioning of remedies.") (internal quotation marks omitted); *Towns of Concord, Norwood, & Wellesley* v. *FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (court "refuse[s] to constrain agency discretion by imposing a presumption in favor of refunds").[5] Thus, this case presents, at most, a misapplication of that principle in the particular context of this case. "[T]he misapplication of a properly stated rule of law" is rarely a basis for certiorari. Sup. Ct. R. 10.

Petitioners argue (96-954 Pet. 11) that "[t]here is nothing about this case to suggest" that a deferential standard of review of FERC remedies is inapplicable here. Section 501(a) of the NGPA broadly authorizes the Commission to "perform any and all acts * * * as it may find necessary or appropriate to carry out its functions" under the Act. 15 U.S.C. 3411(a). We agree that NGPA remedial provisions should be construed to confer broad discretion on FERC. See, *e.g.*, *Mustang Energy Corp.* v. *FERC*, 859 F.2d 1447, 1462 (10th Cir. 1988), cert. denied, 490 U.S. 1019 (1989). But there is some basis for the proposition that FERC's remedial discretion was uniquely constrained in this case. Indeed, the court of appeals specifically noted PSCC's argument that, "whereas the [Natural Gas Act] gave the Commission discretion to order refunds if it determined that a rate was not just and reasonable, the NGPA established

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[5] Indeed, the court's opinion cites with approval *Williams Natural Gas Co.* v. *FERC*, 3 F.3d 1544 (D.C. Cir. 1993) (see Pet. App. 18a)—one of the decisions that FERC itself invoked to support its remedial order.

maximum lawful prices and gave the customer a right to a refund if it was overcharged." Pet. App. 22a. And, the court further noted, "[h]ere the agency did not change the law—rather, the Congress did when it enacted the NGPA in 1978." *Id.* at 28a. It might therefore be argued that once rates were determined to exceed the NGPA's *statutory* ceiling, FERC lacked the full measure of authority that it has in the context of "just and reasonable" *administrative* rate-setting under the NGA to limit relief.

The Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, § 2(b), 103 Stat. 158 (effective Jan. 1, 1993), repealed the statutory price ceilings at issue in this case. Given that the court of appeals' decision arose in the context of the NGPA's statutory price ceilings—a feature that is absent from the NGA—the repeal of the operative NGPA provisions furnishes an additional reason for this Court to deny review.

Amoco's contention (96-954 Pet. 17-18) that the court of appeals' decision will interfere with FERC's administration of its regulations by undermining the reliability of Commission policy in the eyes of the regulated community appears to be unfounded. If the decision below is limited to cases arising under the NGPA, it should present no threat to the public's confidence in FERC's continuing regulatory programs under other statutory provisions. If regulatory compliance problems do arise, they might warrant review in a future case.

2. The claim of cross-petitioner Williams Natural Gas Company (Williams) (96-1230 Pet. 6-11) that FERC should have ordered refunds dating from 1978 was not raised by Williams in the court of appeals and thus is waived. See *Ryder* v. *United States*, 115 S. Ct. 2031, 2036 n.4 (1995). In any event, review is barred by

Section 506(a) of the NGPA, 15 U.S.C. 3416(a). Section 506(a)(2) states that "[n]o person may bring an action under this section to obtain judicial review of any order of the Commission unless * * * such person shall have made application to the Commission for rehearing under this subsection." 15 U.S.C. 3416(a)(2). Section 506(a)(2) also requires that "[a]ny application for rehearing shall set forth the specific ground upon which such application is based." *Ibid.* Section 506(a)(4) specifies that "[n]o objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing." 15 U.S.C. 3416(a)(4).

Cross-petitioner Williams failed to satisfy the requirements of Section 506. Cross-petitioner did not seek rehearing before the Commission. Section 506 requires that the party seeking judicial review must have raised the issue before the agency, and cannot rely on the fact that another party filed a petition. See *Williams Natural Gas Co.* v. *FERC*, 943 F.2d 1320, 1328 (D.C. Cir. 1991); *Railroad Comm'n* v. *FERC*, 874 F.2d 1338, 1342 (10th Cir.), cert. denied, 493 U.S. 954 (1989); *Interstate Natural Gas Ass'n* v. *FERC*, 716 F.2d 1, 15 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984). In any event, as noted above, see pages 4-5, *supra*, no other party raised on rehearing the full-retroactivity issue petitioner now seeks to raise.[6] The statutory rehearing requirements are

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[6] Only PSCC filed a rehearing request that mentioned relief dating from 1978, but PSCC actually sought relief dating only from 1983. Thus, even had PSCC filed a certiorari petition in this Court seeking refunds back to 1978, it would not have met the Section 506(a)(2) "specific ground" requirement.

jurisdictional, and failure to meet them bars judicial review. See *Interstate Natural Gas Ass'n*, 716 F.2d at 15; see also, *e.g.*, *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 780 n.23 (1984) (citing parallel provision of Federal Power Act).

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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